

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On September 18, 2017 appellant, then a 53-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2017 she strained her lower back when a step broke in half as she was descending a staircase while in the performance of duty. She stopped work on September 12, 2017. OWCP accepted appellant's claim for lumbar strain and left leg contusion. It paid her wage-loss compensation on the supplemental rolls, effective November 10, 2017.

Appellant returned to full-duty work on March 29, 2018.

On May 16, 2018 appellant filed a claim for a schedule award (Form CA-7). She submitted a March 28, 2018 note by Dr. Catherine Watkins Campbell, a family practitioner, who noted that appellant had reached maximum medical improvement (MMI) on March 28, 2018.

In a development letter dated May 31, 2018, OWCP requested that Dr. Watkins Campbell provide a medical report, which included an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). OWCP afforded her 30 days to submit the requested information.

By decision dated September 5, 2018, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of her accepted September 9, 2017 employment injury.

On September 14, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 14, 2018 report, Dr. Watkins Campbell discussed appellant's history of injury and noted her accepted conditions of bilateral lumbar sprain and left leg contusion. She related that she initially evaluated appellant on October 6, 2017 and noted that appellant had pain in her right hip radiating down to the right knee. Dr. Watkins Campbell indicated that she conducted an examination and had diagnosed contusion of the lower back and pelvis, contusion of the right thigh, and strata muscle fascia and tendon of lower back. She explained that, because appellant had no complaints regarding a left leg contusion when she initially evaluated appellant, she chose to provide an impairment rating based on the soft tissue injury to the right hip region. Utilizing Table 16-2, *Hip Regional Grid*, Dr. Watkins Campbell assigned a Class 1 rating for diagnosis of hip bursitis with a default impairment of one percent permanent impairment. She

³ A.M.A., *Guides* (6th ed. 2009).

reported grade modifiers of 2 for functional history (GMFH) due to gait derangement and antalgic limp. Dr. Watkins Campbell also indicated a grade modifier of two for physical examination (GMPE) due to observed palpatory findings and a grade modifier of zero for clinical studies (GMCS). She applied the net adjust formula $(2-1) + (2-1) + (0-1)$ and determined that appellant had two percent right lower extremity impairment. Dr. Watkins Campbell noted that appellant had reached MMI as of March 28, 2018 for the conditions that she initially diagnosed.

Appellant submitted several reports from September and October 2017, including a September 13, 2017 emergency department hospital record, progress notes dated September 16 and 25, 2017 by Dr. Dvorkin Wininger, Board-certified in physical medicine and rehabilitation, regarding appellant's lumbar and leg injury, and an October 6, 2017 attending physician's report (Form CA-20) by Dr. Watkins Campbell.

By decision dated October 19, 2018, OWCP's hearing representative vacated the prior decision and remanded the case for further development of the medical evidence.

On remand OWCP routed the case file, along with a statement of accepted facts (SOAF), to Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review as to whether appellant sustained permanent impairment as a result of her accepted September 9, 2017 employment injury. In a January 30, 2019 report, Dr. Kuhn indicated that he reviewed Dr. Watkins Campbell's September 14, 2018 impairment rating report and explained that he disagreed with her impairment rating because it was based on a medical condition that was not accepted by OWCP. He reported that appellant's accepted conditions were lumbar sprain and left leg contusion. Utilizing Table 17-4, *Lumbar Spine Regional Grid*, Dr. Kuhn noted that appellant was a Class 0 impairment for a documented history of a resolved sprain with no objective findings. He also referenced Table 16-3, *Knee Regional Grid*, for the diagnosis of left leg contusion and opined that appellant was a Class 0 impairment for no significant abnormal findings on examination. Dr. Kuhn concluded that appellant had no permanent impairment causally related to the accepted September 9, 2017 employment injury. He reported a date of MMI of September 14, 2018.

By decision dated February 14, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence of record failed to establish permanent impairment of a scheduled member as a result of her accepted September 9, 2017 employment injury.

On February 21, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 11, 2019. Counsel argued that the DMA did not give appropriate analysis to Dr. Watkins Campbell's impairment rating report.

By decision dated August 12, 2019, the hearing representative affirmed the February 14, 2019 decision. She found that the DMA correctly determined that appellant had no permanent impairment causally related to her September 9, 2017 employment injury.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁷

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of an organ under FECA.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁰

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted that on September 9, 2017 appellant sustained a lumbar strain and left leg contusion injury. Appellant filed a claim for a schedule award and submitted a September 14, 2018 impairment rating report by Dr. Watkins Campbell, her treating physician. OWCP subsequently routed appellant's claim to a DMA for review. In a January 30, 2019 report, the DMA referenced Table 17-4, *Lumbar Spine Regional Grid*, and determined that appellant was a Class 0 impairment for her accepted lumbar sprain condition. He also utilized Table 16-3, *Knee Regional Grid*, and opined that appellant was a Class 0 impairment for her accepted left leg

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ *See id.* at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

contusion condition. OWCP denied appellant's schedule award claim based on the DMA's January 30, 2019 report.

The Board finds that the DMA properly provided a rating in accordance with the A.M.A., *Guides* for appellant's left leg contusion injury. The Board also finds that the DMA's rating report is of diminished probative value regarding appellant's permanent impairment due to her accepted lumbar injury as he did not properly apply the specific methodology for rating spinal nerve impairments affecting the upper or lower extremities in accordance with the A.M.A., *Guides*.¹¹ The DMA determined that appellant had no permanent impairment due to her accepted lumbar sprain according to Table 17-4 of the A.M.A., *Guides*. He failed, however, to discuss the standards of *The Guides Newsletter*, the above-described FECA-approved methodology, which provides for a permanent impairment rating based on peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries.¹² Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁵ On remand OWCP should request clarification or a supplemental report from the DMA regarding whether appellant sustained permanent impairment as a result of her accepted lumbar strain injury in accordance with *The Guides Newsletter*.¹⁶ After this and other such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.¹⁷

CONCLUSION

The Board finds that this case is not in posture for decision.

¹¹ See *L.L.*, Docket No. 19-0214 (issued May 23, 2019); see also *G.S.*, Docket No. 13-1649 (issued December 24, 2013).

¹² See *supra* notes 9 & 10.

¹³ *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁴ *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁵ *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

¹⁷ See *E.T.*, Docket No. 18-0262, *Order Remanding Case*, (issued November 22, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 30, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board